

The CURE

Contract User's Resource for Excellence

The "CURE" is a quarterly newsletter of the State Controller's Office

Volume 5, Issue 4

November 1999

News From The SCO

A State Controller's Office Update

By John Ivy, SCO

⇒ CCIT Meetings – Month Change

At the last CCIT meeting in July a vote was taken of the members present and it was decided to move the CCIT meetings ahead one month to avoid not only the fiscal year end open/close, which is a busy time for state contracting, but also the calendar year end, which is a busy time for all of us with the holiday festivities.

CCIT Meetings will be held on the third Wednesday of the month in February, May, August and November.

⇒ November CCIT Meeting – New Location

The November CCIT meeting will again be held in a new location. The meeting is scheduled for Wednesday, November 17th from 9:00 a.m. to noon in Building 100 at Camp George West. For those of you not familiar with Camp George West, it is located on the East side of Golden about fifteen minutes from downtown Denver. It is easy to get to from all parts of the Denver Metro area and is convenient for our out of town members because of its proximity to all major highways. Parking at Camp George West is not only abundant, it is also free. Coffee and donuts will be provided for the break and there are pop machines located in the adjacent building. A map is included with this issue of the CURE for your information.

⇒ CURE Publication Dates

The CURE publication dates have been changed to reflect the new CCIT meeting dates. The CURE will be published in February, May, August, and November. If you would like an article included in the CURE, please e-mail it to me prior to the first day of the month of publication. Articles from agencies are always a wel-

come addition to the CURE. If you need assistance in finalizing your article, please give me a call or e-mail a draft and I will be happy to work with you to get your article ready for publication.

⇒ Contract Training

Contract Management Training and the Contracts II course continues to be in demand. Remember that these courses can be tailored to meet agency needs. Let us know if you would like to see a new course added. Please give Brad Mallon a call at 303-866-4265 for additional information or to schedule training.

Central Approvers Names and Numbers

NAME	PHONE #	FAX #
State Controller's Office		
Fiscal Rule Waivers and Statutory Violations		
John Ivy	303-866-3765	303-866-3569
Privatization Program		
Yvonne Anderson	303-866-2862	303-866-3569
Contract Unit		
Phil Holtmann	303-866-3809	303-866-3569
Chris Trujillo	303-866-3820	303-866-3569
Attorney General's Office:		
David Kaye	303-866-5142	303-866-5671
James Martin	303-866-5227	303-866-5671
Rod Wolthoff	303-866-5027	303-866-5671
Real Estate Services:		
Mike Beery	303-866-4564	303-866-4367
State Buildings Programs:		
Carol Lieber	303-866-3158	303-894-7478
State Purchasing:		
Kay Kishline	303-866-6181	303-894-7444
Jane Lopez	303-866-6146	303-894-7478

NOTE: You may e-mail any of the above by using the following format: **firstname.lastname@state.co.us**

Rod Wolthoff
Assistant Attorney General
A new kid on the block.

In the last issue of the CURE it was noted that effective July 1, 1999, Richard Pennington assumed the position of State Purchasing Director. A search was launched along to same path that brought Richard to the State of Colorado for a replacement. Rod Wolthoff served with Richard in the Air Force and was selected to replace Richard in the Attorney General's Office. – JTI

Rod Wolthoff comes to us after retiring from the United States Air Force this year. Rod entered the Air Force after completing an undergraduate and graduate degree at Iowa State University. After four years as a communications officer, he was selected to the Funded Legal Education Program and attended Creighton University School of Law. He graduated in 1982 and started a 17 year career in the Air Force Judge Advocate Department. During that time, he has served at three bases as the Staff Judge Advocate and been stationed overseas twice. In 1991, the Air Force sent Rod to George Washington University to obtain a Master of Law degree in Government Procurement. He is married to Marta Kay, the present Education Services Officer at Brooks AFB in San Antonio. They have one son, Matthew, a second class cadet at the Air Force Academy, and Rebel, a 70 lb. reddish-brown lab. Rod enjoys most sports and is very glad to be finally living in a city with a major league baseball team.

On the World Wide Web at :

www.sco.state.co.us/

CONTRACT PROCEDURES AND MANAGEMENT
MANUAL
[contract/contract.htm](#)

PRIVATIZATION PROGRAM PROCEDURES AND
FORMS
[private/private.htm](#)

CURE
[cure/cure.htm](#)

State Buildings Programs
Updated Forms
By Carol Lieber, SBP

State Buildings Programs' standard contracts and forms are now available on Lotus Notes. To access the contracts and forms, follow these instructions:

- Open Lotus Notes
- Open BIDS Help on GSSBIDS
- Select State Buildings Programs
- Select C. Contract Documents or E. Procedural Documents
- Highlight the document and double-click
- Double-click on the Word icon to open the Attachment Properties
- Select Detach and save the document in the directory of your choice

Instructions for the contracts and forms can be found in D. Policies and Procedures Manual.

These contracts and forms are not to be altered without the approval of Larry Friedberg, Director of State Buildings Programs.

Contact Carol Lieber, 303-866-3158, or Bill Austin, 303-866-3156, if you have questions.

Privatization Program Responsibility
By John Ivy, SCO

In a memorandum dated October 13, 1999, Larry Trujillo, State Personnel Director, delegated his responsibility for the State Privatization Program to Art Barnhart, State Controller.

The Privatization Program, required by state statute, has been in existence since April 1993. Although improvements have been made in the program, there has not been a complete review and evaluation of the program's success in over six years.

One of Art's initiatives, since assuming responsibility for the program is to review and evaluate the program's effectiveness. If you have ideas on how the program can be improved not only to meet legislative intent, but also to assist in compliance, please give Yvonne Anderson a call at 303-866-2862. She remains the primary program contact in the SCO.

Procurement Pearl

By Richard Pennington, State Purchasing Director

Modification to Terms of Purchase Order

The policy governing modification to the terms of purchase orders in Annex B of the *Contract Procedures and Management Manual* applied to the previous version of the purchase order. I have attached a revised, DRAFT version of that policy, that includes a discussion about "credit agreements" or "direct billing applications," sometimes encountered by agencies and institutions who are trying to host conferences at hotels and political subdivision conference systems.

The initial reluctance to approve these types of agreements was related to the prohibition on the State's entering into credit or debt relationships. However, the agreements I have seen are more akin to "statements" of the services and payment terms. So the language in the new draft policy is intended to give you guidance on those distinctions.

Notice there is considerable flexibility in this policy. For example:

- The draft "permits" changes to the terms and conditions on the PO except as restricted in the policy, reversing the previous approach which restricts changes except as permitted in the policy. The intent here was to limit discretion only in those cases where a fundamental state policy was involved.
- There is discretion to agree to prompt payment periods as low as 30 days.
- The policy more directly addresses the issue of vendor forms and purchase orders, squarely giving the purchasing agent the authority to negotiate vendor terms and conditions, but also making the purchasing agent responsible for what is included in the agreement.

The policy will not be effective until approved by the State Controller. We would appreciate receiving your comments on the draft. We will distribute copies of the draft and discuss the draft at the CCIT meeting.

Personal Services and the Purchase Order vs. Contract Issue

Over the course of the last several weeks, we have had discussions about the purchase order vs. contract issue, in relation to purchase orders and acquisition of services. I am sending a .PDF copy of the State Controller's policy, and we wanted to give you our outlook on this issue.

Essentially the policy and Fiscal Rules leave procurement officials broad discretion here. Fiscal Rule 3-1 does require the use of a State contract (approved consistent with Fiscal Rule 3-1) for certain types of agreements regardless of amount, e.g. A/E or consultant agreements whose selection is governed by CRS 24-30-1401, or leasing land, buildings, or other office or meeting space when the rental is for more than 30 days.

Otherwise, the bright-line test is to use a state contract for acquiring personal services costing over \$25,000. Of course, sometimes the state's interests can only be protected using a State contract, e.g. complex transactions involving milestone definitions, incremental payments upon progress, complex data/document delivery requirements and attending intellectual property rights allocations, etc. But the Fiscal Rules still say that when "questions arise in this area [adequate protection of the state], then either the State Controller or Attorney General's Office can be contacted.

The new purchase order terms and conditions have in some ways ameliorated the risk from not using a state contract, because the Attorney General developed the new PO in order to include the threshold terms and conditions that adequately address services. So assuming you are consulting with your servicing legal counsel in questionable cases, purchase orders are likely to be adequate for small purchases of services (less than \$25,000), with some modification or clarification of the operation of some of the terms governing services. This leaves procurement officers considerable discretion.

The \$25,000 ceiling, however, does remain a regulatory ceiling on the use of purchase orders for acquiring services.

Procurement Pearl

There the rule is fairly clear.

- If the service is priced separately, and greater than \$25,000, then the transaction must be entered using a state contract.
- If services are not priced separately, then a state contract must be used only if the total purchase order amount is greater than \$25,000 and the services are not "incidental to the purchase."

What is "incidental to the service"? The genesis of this definition comes from the Uniform Commercial Code definition of "transactions in goods." The Uniform Commercial Code -- from where many of our PO remedies come in supply procurements -- does not apply to services contracts. Under the law, the characterization of transactions as supplies or services became a critical element, and the predominant nature of the transaction often became a test.

The "incidental to the purchase" test and use of individual line item pricing for services are related concepts. If a service is not incidental to the purchase of a supply, then likely the service components of the transaction should have been separately identified or even separately priced. While this determination of whether the service is "incidental to the transaction" in a supply purchase, we recommend consideration of such things as:

- Whether the cost of service performance is substantial in relation to the actual price of the supply;
- Whether there is an expectation that the service aspects of performance will be separately invoiced and paid. Of course, if this is the case, there should be a separate line item and payment process defined for the service. If that line exceeds \$25,000, then a state contract should be used.
- Whether service performance is done by subcontractors or the same entity that delivers the supply;
- Whether elements of service performance were subject to considerable negotiation, or on the other hand the terms of the particular service performance are largely defined by trade custom or the routine performance offered by the vendor.
- Whether, as in some printing contracts, the predominate value is the labor, skill, creativity, specialized knowledge, or judgment in the design work (probably a service), as opposed to a delivery of an end product that meets product specifications or design requirements largely pre-established by the customer (transaction in goods). Publications that require unusual amounts of "set-up," instances where the State is furnishing substantially all of the materials (e.g. paper), and transactions where ownership of intellectual property rights are a significant issue, tend to be "service contracts." On the other hand, routine printing of business cards or information brochures printed to state specifications would be more akin to commodity or supply purchases.

Again, though, the State Controller's policy grants considerable discretion to make these determinations, unless the service is priced separately and exceeds \$25,000. We recommend that you make your determination on whether to price services separately based on program and risk considerations, e.g. whether the contractor expects payment for supply delivery and services separately. In such a case, there are sound reasons why you need to price the services separately, so you can integrate the inspection and rejection rights, and payment obligation, for different phases of performance.

Insurance

On all IFBs and RFPs for personal services, the Division of Purchasing requires as a matter of policy that solicitations include insurance requirements. The standard state insurance provision is included at clause A-15, page 6-50 of the *Colorado Contract Procedures and Management Manual*. A description of insurance is at page 6-19 of the *Manual*.

Procurement Pearl

As a matter of policy, this requirement has only been applied automatically to IFBs and RFPs for services. This requirement was intended to insure that the state is protected against third party claims or other damages from service performance, the type of contract performance most likely to result in claims against the State. While the State normally would not be liable unless it were deemed to be an "agent" of a vendor, the presence of a vendor on state property or other overt identification of a vendor with a state program makes the state a likely target of a lawsuit whenever a third party is injured by the vendor during performance.

The second reason for the insurance requirement has been to insure that the state is contracting with responsible vendors, those who are financially able to perform. As a rule, most commercial vendors do not have a problem with the state's insurance requirements.

There is no statute, rule or policy that requires inclusion of the insurance clause in other types of procurements, e.g. sole source and documented quotes. However, we consider an analysis of insurance requirements to be a necessary part of any acquisition, whether micro-purchase (less than \$3,000), other discretionary purchases, documented quote, or sole source. On small purchases and supply acquisitions we recommend that you consider the following:

- Whether the unique nature of a supply being furnished may have a potential for third party claims or other damage to state property or personnel;
- The extent to which performance of the agreement may pose a risk of damage to state property or injury to personnel;
- The length of time that the contractor will be on state property during performance of the work, and the nature of the services being performed, e.g. handling hazardous equipment or materials;
- Whether the vendor will be interacting with state clients, students, and/or persons entrusted to the state's care;
- The likelihood, regardless of the nature of the performance, that the vendor may be publicly perceived as being an agent of the state or otherwise identified with the state program.

We recommend you consult with your servicing legal counsel in cases where there may be a question about requiring insurance in any particular procurement, modifying the standard insurance language, or accepting "self insurance" as alternatives to standard insurance coverage. Because the Risk Management Office has the statutory power to "assist state agencies to develop and use proper insurance and indemnity clauses in state contracts," CRS 24-30-1505, you might consider calling their office in doubtful cases as well.

KUDOS

To Lynn Kirk, Auraria, for taking the time to give use comprehensive comments on the draft RFP terms and conditions in the Working Procurement Manual in the New Century Procurement Topics.

New Century Procurement Topics

We are working on a discussion topic on "documented quotes" and the related issue of small purchase limits. We have heard lots from you all about how you do the DQ business, and we would like to open a dialogue about how to incorporate "value" concepts into our quote and award process in small purchases.

Notice that there is an "Open Forum" category in the New Century Procurement Topics database. We opened that with an index that I will try to maintain on all of these snips of policy, discussion, ideas, etc so you can find them. Otherwise, have at the Open Forum everyone. If you clone a particularly good IFB or RFP, let us know on the forum. Don't be shy!

I have also put the results of our latest OIT and New Century dialogues on the Open Forum.

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New CCIT Meeting **Location** (Please refer to map.)



Key to CCIT Abbreviations

Attorney General's Office	AGO
Central Approvers Task Force	CATF
Colorado Contract Improvement Team	CCIT
Contract User's Resource for Excellence	CURE
Division of Purchasing/State Buildings	DOPSB
General Support Services	GSS
Real Estate Services	RES
State Buildings Programs	SBP
State Controller's Office	SCO

CCIT Meeting

Wednesday November 17, 1999
 Camp George West – Golden, Colorado
 Building 100

Agenda

9:00-9:10	Facility Briefing	Chris Trujillo
9:10-9:30	Privatization Update	Yvonne Anderson
9:30-10:00	Purchase Order Policy	Richard Pennington
10:00-10:15	Break	
10:15-10:30	Late Grant Contracts	David Kaye
10:30-11:00	Contract Improvements	Phil Holtmann
11:00-noon	Comments & Questions	Central Approvers